GROUP OF GOVERNMENTAL EXPERTS OF THE STATES PARTIES TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS

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The adequacy of existing international law in minimising the post-conflict risks of Explosive Remnants of War

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I. Introduction

The work entrusted upon us concerns "the adequacy of existing international law in minimising the post-conflict risks of explosive remnants of war, both to civilians and to the military." This paper aims at identifying the issues that might need to be addressed when we embark down such a road. Hopefully the paper can serve as a starting point for discussion. Since there will be papers that will contain a deeper legal analysis, this paper only touches the surface of the legal complexities. Perhaps some of the issues and questions raised in this paper can be read together with such in dept legal analysis papers and serve as a check-list.

Allow me also to underline that this is a non-paper (I do not like the expression non-non paper since two "negatives" eliminate each other).
It does not necessarily represent the view of the Swedish government and it has not been cleared at political level. It simply aims at serving as food for thought.

Please note that this paper does not deal with the technical aspects of explosive remnants of war (ERW).

II. International law and the RW problem

In order to address the relevance of IHL in minimising the post-conflict risks, one has to discuss (or at least touch upon) the entire chain of issues relating to the use of weapons that cause ERWs, namely planning, production, acquisition, use and removal.

II.1. Before the remnants are there (preventive measures)

As I see it, we must proceed from the assumption that the weapons that could result in explosive remnants of war are legitimate as such. Otherwise we will have to address an entirely different set of questions. There is no such thing as an "ERW weapon" that is already

prohibited as a *means* of warfare. The consequence of this hypothesis is that we do not need to address the legitimacy of planning and acquiring the weapons that could result in ERWs.

However, we may need to address whether weapons that could result in ERWs should be equipped with mechanisms that make it impossible for them to remain ERWs after a certain period. This is an issue for the technical group to address. If the technical experts come to the conclusion that it is possible to strengthen the "technical" elements, the lawyers need to look at how this should be regulated and what legal consequences it would have if these regulations were not obeyed.

At the next stage, namely the planning to use and the use of weapons that could result in ERWs, a number of relevant rules, provisions and principles exist that are as applicable to "ERW weapons" as to any other weapons. Such rules primarily address the method of warfare. The rules and principles in international humanitarian law, such as *precautions in attack*, the *principles of distinction and proportionality*, as well as the *concept of military necessity* are all highly relevant and provide an adequate legal framework. But are they sufficient? Do they need to be specified or developed? And if they are considered not sufficient, is the CCW process the context in which to address the *lacunae*?

In this context we may need to discuss whether the protection for combatants and civilians (and civilian society) should come (or should be placed) under the same legal hat (the Hague law vs. the Geneva law, to put it simply.)

II.2. Once the remnants are there (reactive measures)

Once a weapon that causes an ERW has been used, a number of legal questions arise.

Let me first start with the basic thesis that, as of today, there exist no specific legal regulations with respect to remnants of war[1] *in general*. Attempts have been made to address the issue, but they have failed for various reasons, not least since states that have been involved in armed conflicts, for example the European states during the two World Wars, have been reluctant to regulate the issue. Instead, they have preferred to regulate it in bilateral post-war treaties.

The issue on remnants of war was raised during the 1970s from an environmental perspective.[2] It found its way to the United Nations General Assembly (1980) and led to the adoption of a number of resolutions on the problems of remnants of war.[3] By the end of the 1980s the question had 'disappeared' from the agenda of the UNGA.

[1] I would suggest the following definitions/terminology. "Remnants of war" refer to all remnants of an armed conflict, irrespective of whether they are strictly military. They are "left-overs" from an armed conflict that basically would not have been there, had not the conflict taken place. Such remnants includes abandoned POW camps, refugee camps, temporary hospitals etc. Remnants of war is the overall label. "Military remnants of war" are remnants that primarily are of a military character, such as vehicles, artillery piece of ordnance etc. "Explosive remnants of war" is still another subgroup and means remnants of war which still run the risk of exploding and hence constitute a threat to the society.
I am aware that these definitions are far from perfect, but they could serve as a tool to specify what we mean when we talk about "explosive remnants of war".

[2] See Arthur H.Westing: Explosive Remnants of War: Mitigating the Environmental Effects, SIPRI/UNEP, Taylor&Francis, London and Philadelphia, 1985, esp. p.11. and Appendix 2, neither is the call for a stricter regulation new, see e.g. Jozef Goldblat: Explosive Remnants of War: Legal Aspects, in Westing (ed.) p.77.

[3] A good way to follow the development is to start with G.A. Res.35/71.

The regulation most akin to a regulation on remnants of war is the regulation in international law to pay compensation after an armed conflict.

The most quoted concrete obligations on responsibility are found in Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, the Hague, 18 October 1907, (hereinafter: Hague IV), Article 3 (hereinafter Hague IV) and the 1977 First Additional Protocol to the 1949 Geneva Conventions (hereinafter: Protocol I).

Article 3 of Hague IV provides that:

"A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

Similarly Article 91 of Protocol I provides (under the heading "Responsibility") that:

"A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

In essence the two articles aim at regulating the same issue.[4]

It is also important to recall an article in the 1949 Geneva Conventions that is common to all four conventions.[5] The article reads:

"No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article."

However, those provisions address the issue of compensation and not removal or responsibility/liability. Hence they do not address a situation in which there has been no breach of the law, but the MRW still remain on the territory. As long as a weapon is legal and is used in a legal way, the question of compensation or removal does not arise under the quoted articles.

If we try instead to identify whether there is any other relevant area of international humanitarian law that addresses the issue of removal, we will find that the first two most important treaty provisions that regulate removal are found in the 1907 Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines. The Hague (hereinafter: Hague VIII) and the 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Protocol II, (hereinafter CCW Protocol II). Both Conventions oblige the parties to do their utmost to remove mines laid, but neither of them entails a clear-cut obligation to remove the mines or provides exact guidance on whose responsibility it is to remove the mines.

[4] See e.g. ICRC: Commentary to the Additional Protocol, Geneva 1987, p. 1053.
[5] GC I, Article 51, GC II:52, GCIII:131 and GCIV:148.

Article 5 of Hague VIII reads:

“At the close of the war, the Contracting Powers undertake to do their utmost to remove the mines which they have laid, each Power removing its own mines.
As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.”

Article 9 of CCW Protocol II provides:

“After the cessation of active hostilities, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organisations, on the provision of information and technical and material assistance -- including, in appropriate circumstances, joint operations -- necessary to remove or otherwise render ineffective minefields, mines and booby-traps placed in position during the conflict.”

These provisions reflect political reality since effective removal has required agreements between the parties concerned. That is understandable, not only because the states on whose territory mines have been placed have the prerogative to accept or reject assistance, but it is also an indication that states have not been able to agree on whose responsibility it is to remove mines laid during a conflict. The regulation addresses the issue as an issue of co-operation rather than of a one-sided obligation. A state which “feels” that it is a “victim” is still under the obligation to co-operate and to act on its own.

The States Parties that amended Protocol II were of the view that the above mentioned provisions were not strong enough. They therefore agreed on a stronger provision in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (hereinafter: Revised Protocol II).

Article 10 of the Revised Protocol provides:

"1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol.

2. High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control.

3. With respect to minefields, mined areas, mines, booby-traps and other devices laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 2 of this Article, to the extent permitted by such party, technical and material assistance necessary to fulfil such responsibility.

4. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities."

Article 10 should be read together with the subsequent article, Article 11, which addresses technological cooperation and assistance. From the reading of these two articles it seems possible to conclude that the value norm has mowed towards a stricter and more clear-cut obligation as regards removal or destruction of minefields, mines, booby-traps and other devices. At the same time it is as difficult to ascertain the legal status of the provision (has it reached a customary law level) as it is to determine exactly "who should do what", i.e. how the responsibility of the "High Contracting Parties and parties to the conflict" should be allocated.

It seems clear that adherence to existing treaties may help to some extent, but it does not solve the problem. This raises the question of whether the present, relatively weak and vague, treaty regulations are sufficient or whether they could be improved. Or is it better to rely on individual *ad hoc*, bilateral post-conflict solutions? Is it likely that states that have been involved in a conflict voluntarily accept such a responsibility? Should they be under a new treaty obligation to do so?

III. Further issues to be discussed

In international law it is clear that harm that arises from acts prohibited by international law have certain legal consequences, whereas harm from acts not prohibited have other legal consequences. In very simplified terms it could be said that harm caused by a non-prohibited act can entail liability, whereas harm caused by a prohibited act entails state responsibility.[6]

As mentioned *supra*, there are few legal rules directly connected to responsibility/liability for remnants of war. The rules that most closely regulate this are the provisions on liability in Hague IV and Protocol I. In addition it should be noted that there is also a state practice whereby states have paid reparations after a war. It is however difficult to see what legal conclusions may be drawn from this practice, e.g. how far it can be said to reflect customary international law, including the *opinio juris* of states.

From a principle point of view it seems important to discuss what kind of legal regime we are aiming at. Do we want a legal regime that “punishes” or a legal regime that “prevents and/or repairs”? From the perspective of the victims, I am inclined to believe that we primarily need the latter. Only if we want to take another perspective such as that of strategic or tactical prevention, do we need the former. At the same time we should be aware that although there already exists under international humanitarian law, an individual responsibility for breaches of international law relating to the manner in which a weapon is used, such a responsibility does not necessarily cover failure to remove ERWs.

Hence, there is a need to discuss whether we are to address the responsibility/liability of a state and/or of an individual. That is to say, we have to address the issue of when a breach of an existing or coming IHL rule generates individual responsibility and if it should be covered in a future regulation on ERWs.

[6] State responsibility does not exclude economic compensation.

There is also an issue of a geographical character that needs to be addressed. Does it matter where the ERWs are situated? Are we going to adopt a functional approach: i.e. every ERW wherever left is to be covered? Or are we going to adopt a geographical approach: we are only dealing with ERWs on land territory? And if so, will that land territory include internal waters? Finally, are we to make a distinction between ERWs on another state's territory and ERWs on a state's own territory?

We also need to address the situation that arises when a state fails to take its responsibility. Where can the "victim state" turn? Does the international community as such have a "secondary" responsibility to act if parties to a conflict do not clear an area? And if so, what entity will represent the international community and can that entity ask for reimbursement? Or can this issue be omitted from a future regulation (i.e. remain unanswered)?

Instead of focusing on a secondary responsibility for the international community, which could also threaten to discourage states from taking their responsibility to act, it might be better to focus on another type of solution. Given the realistic political need to focus on co-operation and shared responsibility, might it be better and more efficient to focus on compulsory settlement procedures? Technically, it is a relatively easy task to establish such procedures, with or without an arbitral tribunal. Whether or not it is politically viable is another issue.